

In Re:

Docket No. MPC 15-0203, et al

## BACKGROUND

The Board Hearing Panel met on August 12, 2004, and included James D. Cahill, M.D.; Patricia A. King, M.D., Ph.D.; Sharon L. Nicol, Public Member; Katherine M. Ready, Public Member; Toby Sadkin, M.D.; John B. Webber, Esq., Public Member; and Robert O'Brien, M.D., Ad Hoc Member. Phillip J. Cykon, Esq. served as Presiding Officer for the Board. Joseph L. Winn, Esq. appeared on behalf of the State of Vermont. Eric S. Miller, Esq. and R. Jeffrey Behm, Esq. appeared on behalf of Respondent, David S. Chase, M.D., who was present at the hearing.

1. MOTION TO DISMISS SUPERCEDING SPECIFICATION OF CHARGES

As to the disclosure of the witnesses' medical records, Respondent in his Reply Memorandum dated 8/9/04 and at hearing, conceded that the State has produced a complete copy of the medical records of the witness in question. There is no failure to disclose in this regard.

Page 1 of 3

witnesses at the disciplinary hearing. Assuming that the Board has the right to dismiss the Specification of Charges at this point, Respondent's allegations fall well short of warranting such a drastic action as dismissal.

For these reasons, Respondent's second Motion to Dismiss Superceding Specification of Charges is unanimously **DENIED**.

## 2. MOTION FOR ACCESS TO PATIENT MEDICAL RECORDS AND PATIENT EXAMS

Respondent also moves the Board for access to patient medical records and patient exams. Essentially, Respondent complains that he has been denied the same access to patient medical records and opportunity for independent medical examinations that the State has had. Respondent further states that to the extent that he is not able to obtain equal access to what he seeks, the Board should exclude evidence pertaining to those witnesses. In a collateral request, Respondent asks that the Board order the Attorney General's Office from cooperating with malpractice attorneys involved in civil malpractice actions against Respondent.

Respondent bases his request for access to patient records and opportunity for an independent medical exam on law related to civil malpractice actions and other actions covered by the Vermont Rules of Civil Procedure. At the outset, the civil rules of procedure are inapplicable to administrative hearings. Condosta v. D.S.W., 154 Vt. 465, 467 (1990) and International Assoc. of Firefighters Local #2287 v. Montpelier, 133 Vt. 175, 177 (1975).

As the Board has established in previous rulings in this matter, it does not have a general grant of authority to provide for the full arsenal of discovery methods and tools that are available under the rules of civil procedure. A Board licensee is entitled to receive certain information under 26 V.S.A. § 1318(e), which reads in relevant part as follows:

A licensee ... shall have the right to inspect and copy all information in the possession of the department of health pertaining to the licensee ..., except investigatory files which have not resulted in charges of unprofessional conduct and attorney work product.

See also Board Rule 19.1. The Attorney General's Office has represented in hearing that it has provided everything that Respondent is entitled to under this statute. In addition, both parties at this motion hearing represented that the patients' in question and their attorneys were willing to sign a limited release to allow Respondent certain access to medical records.

The Vermont Administrative Procedure Act (VAPA) does not establish any type of discovery procedure that would give the Board the authority to compel what Respondent requests. VAPA does provide for the enforcement of agency subpoenas regarding testimony and production of documents. 3 V.S.A. § 809a. A Board statute, 26 V.S.A. § 1353(3), does grant the Board the power to "[T]ake or cause depositions to be taken as needed in any investigation, hearing or proceeding." Board Rule 16.2 covers "Discovery" and authorizes the Board or legal counsel to "issue orders regulating discovery and depositions." These are the procedures that the

Vermont Legislature gave the Board to carry out its administrative responsibilities. These are the procedures that are available for Respondent and the State to use to prepare for hearing. The Board does not have the authority to order patients to release their medical records or to submit to an independent medical examination. If the Legislature had intended the Board to exercise such intrusive procedures, it would have specifically granted such authority.

The Board notes that these issues were raised at the Prehearing Conference held on 11/12/03 and discussed in the Board's Order Re Respondent's Motion to Compel issued shortly thereafter. In addition, the issue of independent medical examinations was raised at the prehearing conference on 12/16/03 and discussed in the Board's Prehearing Conference Report issued shortly thereafter. Respondent was given adequate notice of the procedures that should be utilized in this matter.

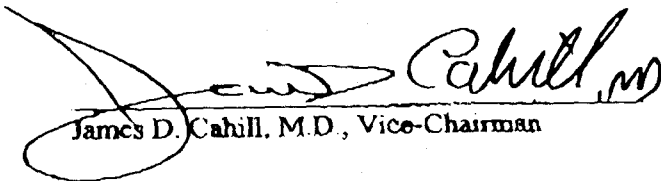
As for the exclusion of evidence at this stage of the proceeding, neither the state of the evidence nor the law governing administrative hearings support Respondent's request. The Board further notes that Respondent will have full opportunity to cross-examine witnesses and introduce his own evidence at the disciplinary hearing, at which the State must prove its allegation by a preponderance of the evidence. The rights provided under VAPA and the preponderance of evidence burden of proof placed on the State comply with "the constitutional process due" to the Respondent. In re Smith, 169 Vt. 162, 172 (1999).

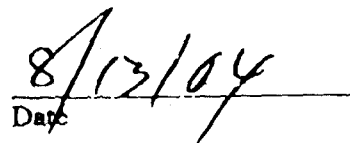
Lastly, Respondent requests the Board to order the Attorney General's Office to stop cooperating with malpractice attorneys involved in civil malpractice actions against Respondent. Beyond communicating with attorneys representing patients, it is not clear what the Attorney General's Office has done to "cooperate" with malpractice attorneys. The Board expects all attorneys to practice according to the law and the Code of Professional Responsibility. At any rate, it is highly questionable that the Board has the authority to control the professional activities of Assistant Attorneys General, and the board is not going to insert itself into the professional relationships among attorneys involved in parallel proceedings.

For these reasons, Respondent's Motion for Access to Patient Medical Records and Patient Exams is unanimously **DENIED**.

SO ORDERED.

FOR THE BOARD OF MEDICAL PRACTICE:

  
James D. Cahill, M.D., Vice-Chairman

  
Date